No. _____

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1998

REDBUD COMMUNITY HOSPITAL,
ADVENTIST HEALTH, INC.,

Petitioners,

vs.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA,
DAVID BURROWS, RHODA THOMAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a federal court case with claims under both California medical malpractice law and the federal Emergency Medical Treatment and Active Labor Act (EMTALA) (42 U.S.C. § 1395dd), the district court ordered the discovery of a hospital's peer review committee materials, overruling the hospital's objections that the materials are privileged. It is undisputed that California statutory law prohibits the discovery of those materials in state medical malpractice cases. Rule 501 of the Federal Rules of Evidence provides that federal common law generally governs privilege determinations, except that state privilege law applies in civil cases "with respect to an element of a claim or defense as to which State law supplies the rule of decision." The questions presented are:

1. Whether state privilege law should apply to protect hospital peer review committee materials from discovery when state interests in confidentiality outweigh federal interests in disclosure. This Court has "note[d] that there is disagreement concerning the proper rule in cases . . . in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1931 n.15 (1996).

2. If federal privilege law applies, whether that law should bar discovery as a matter of comity between state and federal sovereignties in EMTALA cases.

QUESTIONS PRESENTED – Continued

3. If federal privilege law applies, whether that law should recognize a privilege for hospital peer review committees in EMTALA cases.

LIST OF PARTIES

Petitioners:

Redbud Community Hospital

Adventist Health, Inc.

Respondents:

David Burrows (individually and as successor-in-interest to Cody Burrows)

Rhoda Thomas

United States District Court, Northern District of California

Other Party:

Dr. Wolfgang Schug (will be separately filing a related petition for certiorari)

STATEMENT UNDER RULE 29.6

Adventist Health System/West, Inc., a California nonprofit religious corporation, dba Adventist Health, Inc. has no parent company and no subsidiaries that are not wholly owned. Redbud Community Hospital, now known as Adventist-Redbud Hospital, is owned by Adventist Health Clearlake Hospital, Inc., a California nonprofit religious corporation. Adventist Health Clearlake Hospital, Inc. is owned by Adventist Health System/West, Inc. and has no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Redbud Community Hospital and Adventist Health, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 16, 1998.

OPINIONS AND ORDERS BELOW

The January 13 and May 5, 1998 opinions of the district court are unreported. They are reproduced in the appendix (hereafter cited as "App."), App. 4, 10. The June 8, 1998 order of the Court of Appeals requiring a response to the writ petition and granting a stay pending resolution of the writ petition is unreported and is reproduced at App. 23. The June 29, 1998 order of the Court of Appeals referring the writ petition to a merits panel for disposition is unreported and is reproduced at App. 25. The November 16, 1998 order of the Court of Appeals denying the writ petition after argument is unreported and is reproduced at App. 1. The December 31, 1998 order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing en banc is unreported and is reproduced at App. 27. The January 21, 1999 order of the Court of Appeals granting a stay of mandate pending a petition for writ of certiorari is unreported and is reproduced at App. 30.

JURISDICTION

The Court of Appeals' order denying the writ petition was entered November 16, 1998. The Court of Appeals' order denying the petition for rehearing was entered December 31, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 501 of the Federal Rules of Evidence, California Evidence Code section 1157, and 42 U.S.C. § 1395dd are reproduced in the appendix. (App. 33-44.)

STATEMENT OF THE CASE

Plaintiffs David Burrows and Rhoda Thomas invoked the district court's jurisdiction under 42 U.S.C. § 1395dd (the Emergency Medical Treatment and Active Labor Act) (EMTALA), 28 U.S.C. § 1331 (general federal question jurisdiction), and 28 U.S.C. § 1367(a) (supplemental jurisdiction in federal question cases).

In February 1996, plaintiffs filed suit seeking damages for the death of their 11-month-old son, Cody. (Exh. at 1.)[1] They alleged that Cody was negligently treated in the emergency room of Redbud Community Hospital in

[1] References in this petition to "Exh. at" are to the consecutively paginated exhibits filed in the Court of Appeals concurrently with the writ petition of petitioners Redbud Community Hospital and Adventist Health, Inc.

Clearlake, California, and that, when he was very ill and in an unstable condition, he was discharged from the Hospital and transferred to another hospital two hours away, where he died soon after arrival. (Exh. at 2-4.) Included among the named defendants were the Hospital's owner at the time of the incident (Redbud Community Hospital District), its current owner (Adventist Health, Inc.), and Dr. Wolfgang Schug, who treated Cody in the Hospital emergency room.

Plaintiffs contended the Hospital violated EMTALA, a federal statute specifying certain steps a hospital must take when a person requests emergency medical treatment, and they sought damages under that Act. (Exh. at 6-7.) EMTALA provides that a person harmed by a violation may "obtain those damages available for personal injury under the law of the State in which the hospital is located." 42 U.S.C. § 1395dd(d)(2)(A).

Plaintiffs also pleaded counts under California law for medical negligence, violation of a criminal statute that prohibits the alteration or falsification of medical records, and violation of California statutes similar to EMTALA. Plaintiffs' count concerning the alteration or falsification of medical records was based on allegations that, after Cody's discharge from the Hospital, Dr. Schug tried to explain away his responsibility for Cody's death by destroying personal notes he had made and supplementing Cody's medical records with an "addendum" of false statements about Cody's condition and treatment.

Dr. Schug was not sued under EMTALA because the Act provides no private right of action against individual physicians. *See Eberhardt v. City of Los Angeles*, 62 F.3d

1253, 1255-57 (9th Cir. 1995). However, he was sued under plaintiffs' various state law counts.

In the course of discovery, plaintiffs sought information concerning the Hospital's medical staff peer review committees. For example, plaintiffs requested production of documents relating to investigations of Cody's treatment and to Dr. Schug's admission to the Hospital's medical staff, asked for the identity of committees and committee members who saw any version of Dr. Schug's "addendum," and inquired whether there had been peer review of Cody's treatment. (Exh. at 105, 126, 152, 203.)

The defendants objected on grounds, among others, that the information sought was protected from disclosure by California Evidence Code section 1157(a), which prohibits the discovery of "proceedings" and "records" of hospital medical staff committees "having the responsibility of evaluation and improvement of the quality of care rendered in the hospital." (Exh. at 112, 113, 133, 134, 159, 203.)

Plaintiffs moved to compel production of documents, answers to interrogatories, and answers to deposition questions. (Exh. at 13.) Defendants opposed the motion. (Exh. at 252, 333, 346.) The district court ruled section 1157 inapplicable to the present action. (App. 4.) The court acknowledged that it was an issue "of first impression" (App. 6) whether state law supplies the rule of decision in an EMTALA case for purposes of Rule 501 of the Federal Rules of Evidence, which provides that the existence of a privilege is generally determined according to federal common law, except state law applies in civil cases "with respect to an element of a claim or defense as

to which State law supplies the rule of decision." The court concluded federal law applied.

Although ruling state privilege law did not have to be applied, the district court stated that it should apply the discovery prohibition of California's section 1157 as a matter of comity if it would not be inconsistent with federal law. Relying on an opinion in which a district court declined to apply section 1157 in an antitrust case (*Pagano v. Oroville Hosp.*, 145 F.R.D. 683 (E.D. Cal. 1993)), the district court here "decline[d] to apply § 1157." (App. 9.)

The defendants moved for reconsideration. (Exh. at 443, 466, 582, 606.) In its reconsideration motion, the Hospital argued that discovery was improper under either state or federal law. Alternatively, it asked for a protective order, requesting that discovery, if allowed, be delayed or limited. (Exh. at 613-17.) The Hospital suggested delaying discovery until plaintiffs explained in greater detail how the Hospital's peer review process was involved in the claims plaintiffs were asserting (Exh. at 614-15) and it proposed that the court review the sensitive peer review committee materials *in camera* for relevancy before disclosing them to plaintiffs (Exh. at 615-16).

In an opinion upon reconsideration, the district court ruled that the Hospital peer review committee records were discoverable, subject only to a protective order ensuring the privacy of physicians other than Dr. Schug. (App. 10.) The court concluded categorically that federal privilege law applies to state law claims in federal question cases. (App. 14.) The court also rejected the argument that, because the alleged EMTALA violation did not occur

in the peer review process, section 1157 should apply. The court noted that committee records are not protected "when the plaintiff's claim arises out of the disciplinary proceedings themselves" and ruled that, "to the extent plaintiffs allege Dr. Schug may have been instructed to create the addendum and burn his notes at the peer review meeting, plaintiffs' claim for spoliation of evidence and EMTALA depend on communications made during the peer review proceedings." (App. 15-16.) The court did not state why it would not delay discovery until plaintiffs explained in greater detail how the Hospital's peer review process was involved in the claims plaintiffs were asserting, nor did it say why it would not conduct an *in camera* review of the documents.

The Hospital and Adventist jointly petitioned the Ninth Circuit Court of Appeals for writ relief under the All Writs Statute (28 U.S.C. § 1651). Dr. Schug separately petitioned for writ relief and also appealed from the district court's discovery order. A motions panel of the Court of Appeals granted a stay pending resolution of the writ petitions (App. 23) and referred the writ petitions to a merits panel for disposition (App. 25). After full briefing and oral argument, the court denied the writ petitions with no reasons stated other than a citation to *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977), which provides generally the criteria for writ relief. (App. 1.) The court also dismissed Dr. Schug's appeal for lack of jurisdiction. After denying a petition for rehearing and rejecting a suggestion for rehearing en banc (App. 27), the court granted a stay of mandate pending a petition for writ of certiorari (App. 30).

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES UNRESOLVED PRIVILEGE LAW ISSUES THAT AFFECT A CRITICAL PUBLIC HEALTH POLICY ADOPTED BY ALL 50 STATE LEGISLATURES.

A. The Discovery Ordered Contravenes Unanimous State Policy In Favor Of Protecting The Confidentiality Of Hospital Peer Review Committee Matters.

It is undisputed that plaintiffs' discovery demand would have been barred had they filed their case in California state court. With exceptions not here relevant, California Evidence Code section 1157(a) provides that "[n]either the proceedings nor the records of organized committees of medical . . . staffs in hospitals . . . having the responsibility of evaluation and improvement of the quality of care rendered in the hospital . . . shall be subject to discovery." Section 1157 reflects a crucial state policy to promote effective hospital peer review proceedings by protecting the confidentiality of those proceedings. The same policy has been adopted by all 50 states.[2]

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[2] All 50 states and the District of Columbia recognize a hospital peer review privilege: ALA. CODE § 22-21-8 (1997); ALASKA STAT. §§ 18.23.030, 18.23.070 (Michie 1997); ARIZ. REV. STAT. § 36-445.01 (1997); ARK. CODE ANN. §§ 20-9-304, 20-9-503 (Michie 1997); CAL. EVID. CODE § 1157 (Deering 1997); COLO. REV. STAT. § 13-21-110 (1997); CONN. GEN. STAT. § 19a-17b (1997); DEL. CODE ANN. tit. 24, § 1768 (1997); D.C. CODE ANN. § 32-505 (1997); FLA. STAT. ch. 766.101 (1997); GA. CODE ANN. §§ 31-7-133, -140, -143 (1997); HAW. REV. STAT. § 624-25.5 (1997); IDAHO CODE §§ 39-1392, 39-1392a-f (1997); 225 ILL. COMP. STAT. ANN. 60/5, 735 ILL. COMP. STAT. ANN. 5/8-2101 (West 1997); IND. CODE ANN. §§ 34-30-15-1 to -3, -8, -9 (Michie 1998); IOWA CODE § 147.135 (1997); KAN. STAT. ANN. § 65-4915 (1997); KY. REV. STAT. ANN. § 311.377 (Michie 1996); LA. REV. STAT. ANN. § 13:3715.3 (West

Justice Souter, then of the New Hampshire Supreme Court, ten years ago explained why the states have so acted:

> The reason for seeking enactment of [the New Hampshire statute], and its counterparts in other jurisdictions, was the natural reluctance of hospital employees and staff members to engage in [the] evaluation [of the quality and appropriateness of patient care and clinical performance] after the fact, by furnishing information and voicing critical judgments, if in so doing they would also be compiling a fund of material

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1998); ME. REV. STAT. ANN. tit. 32, § 3296 (West 1997); MD. CODE ANN., HEALTH OCC. §§ 14-501, 14-503 (1997); MASS. ANN. LAWS ch. 111, § 204 (Law. Co-op. 1998); MICH. STAT. ANN. § 14.15 (21515) (Law. Co-op. 1998); MINN. STAT. § 145.64 (1997); MISS. CODE ANN. § 41-63-9 (1997); MO. REV. STAT. § 537.035 (1997); MONT. CODE ANN. §§ 37-2-201, 50-16-201 to -205 (1997); NEB. REV. STAT. ANN. §§ 71-2046 to -2048 (Michie 1997); NEV. REV. STAT. ANN. § 49.265 (Michie 1997); N.H. REV. STAT. ANN. §§ 151:13-a, 329:29 (1997); N.J. STAT. ANN. § 2A:84A-22.8 (West 1997); N.M. STAT. ANN. § 41-9-5 (Michie 1997); N.Y. EDUC. LAW § 6527 (Consol. 1998); N.C. GEN. STAT. § 131E-95 (1997); N.D. CENT. CODE §§ 23-34-01 to -03 (1997); OHIO REV. CODE ANN. §§ 2305.251, 2305.252 (Anderson 1998); OKLA. STAT. tit. 63, § 1-1709 (1997); OR. REV. STAT. § 41.675 (1997); PA. STAT. ANN. tit. 63, §§ 425.2, 425.4 (West 1997); R.I. GEN. LAWS § 5-37.3-7 (1997); S.C. CODE ANN. §§ 40-71-10, -20 (Law. Co-op. 1997); S.D. CODIFIED LAWS § 36-4-26.1 (Michie 1998); TENN. CODE ANN. § 63-6-219 (1997); TEX. REV. CIV. STAT. ANN. art. 4495b (West 1998); UTAH CODE ANN. §§ 26-25-1, -3 (1997); VT. STAT. ANN. tit. 26, §§ 1441, 1443 (1997); VA. CODE ANN. § 8.01-581.17 (Michie 1997); WASH. REV. CODE ANN. § 4.24.250 (West 1997); W. VA. CODE § 30-3C-3 (1997); WIS. STAT. § 146.38 (1997); WYO. STAT. ANN. § 35-17-105 (Michie 1997).

> discoverable by adverse parties in any subsequent litigation against the hospital. State legislatures were accordingly asked to advance the general public interest in promoting a hospital's vigorous self-criticism by immunizing its process and products from discovery by a particular litigant.

In re "K", 561 A.2d 1063, 1067 (N.H. 1989) (citations omitted).

California's experience confirms Justice Souter's observations. The importance of hospital medical staff committees to health care in California hospitals cannot be overstated. This is apparent from the state law requirements that make the committees responsible for investigating and evaluating the competency of physicians who wish to practice at California hospitals. *See Alexander v. Superior Court*, 859 P.2d 96, 99, 23 Cal. Rptr. 2d 397, 400 (1993). Peer review committees have been accurately termed "quasi-public functionar[ies]." *People v. Superior Court (Memorial Medical Center)*, 286 Cal. Rptr. 478, 483 (Ct. App. 1991). It is thus not surprising that California has " 'a strong public interest in supporting, encouraging and protecting effective medical peer review programs and activities.' " *California Eye Inst. v. Superior Court*, 264 Cal. Rptr. 83, 86 (Ct. App. 1989).

Section 1157 was enacted to promote this "strong public interest." By prohibiting the discovery of peer review committee "records" and "proceedings," the statute serves the purpose of "assur[ing] thorough evaluation of the quality of patient care by the members of the medical staff who are responsible for that review." *County of Los Angeles v. Superior Court*, 274 Cal. Rptr. 712, 716 (Ct.

App. 1990). The importance of section 1157 to the effective functioning of the peer review committee system was explained in the seminal decision of *Matchett v. Superior Court*, 115 Cal. Rptr. 317, 320 (Ct. App. 1974), an explanation endorsed by the California Supreme Court in *Alexander*, 859 P.2d at 99, 23 Cal. Rptr. 2d at 400 and *West Covina Hosp. v. Superior Court*, 718 P.2d 119, 122-23, 226 Cal. Rptr. 132, 135-36 (1986):

> When medical staff committees bear delegated responsibility for the competence of staff practitioners, the quality of in-hospital medical care depends heavily upon the committee members' frankness in evaluating their associates' medical skills and their objectivity in regulating staff privileges. Although composed of volunteer professionals, these committees are affected with a strong element of public interest.
>
> . . . Section 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality.

(Footnote omitted.)

B. Important Privilege Law Issues Are Presented.

1. This Court should resolve the "disagreement" that it noted exists "concerning the proper rule in cases . . . in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law."

In federal court, privilege determinations are "governed by the principles of [federal] common law," except that state privilege law applies in civil cases "with respect to an element of a claim or defense as to which State law supplies the rule of decision." Fed. R. Evid. 501. The district court in this case refused to apply California's crucially important hospital peer review committee privilege simply because both state law claims and a federal claim under EMTALA are at issue – the court categorically declared "state law claims that are pendent to federal question cases are governed by federal privilege law." (App. 14.) But it is not nearly so cut and dried.

This Court recently recognized that the issue so unhesitatingly dispatched by the district court is in fact unresolved. In *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996), the Court held that a psychotherapist privilege under federal law barred a plaintiff's discovery demand. The Court explained, however, that had there been no federal privilege, an open question would have been presented regarding the applicability of a state psychotherapist privilege because the plaintiff there was asserting both a wrongful death claim under state law and a federal section 1983 claim:

> We note that there is disagreement concerning the proper rule in cases such as this in which

> both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law. See C. Wright & K. Graham, 23 Federal Practice and Procedure, § 5434 (1980). Because the parties do not raise this question and our resolution of the case does not depend on it, we express no opinion on the matter.

Jaffee, 116 S. Ct. at 1931 n.15.

The issue not decided in *Jaffee* is presented here. The parties have raised and extensively briefed the issue, and the district court's refusal to apply the California privilege was based on its specific ruling that state law privileges do not apply to state law claims in federal question cases. Also, the issue is determinative of this case, unless, as in *Jaffee*, a privilege is recognized as a matter of federal law, but that raises additional unresolved questions meriting this Court's attention, which we discuss in following sections.

Besides the need to resolve the "disagreement" identified in *Jaffee*, certiorari is necessary to prevent categorical rejection of state law privileges in federal question cases with pendent state law claims. Under such a rule, as happened in this case, critical state policies are sacrificed with little or no corresponding benefit to federal interests. There is a better alternative.

The treatise cited by the *Jaffee* Court states that because an authoritative Congressional report "says that federal privilege law will '*generally* apply' in nondiversity cases, it must be assumed that Congress recognized that state privilege law would apply in at least some cases in which the jurisdiction of the court was premised on some

federal interest." C. Wright & K. Graham, 23 Federal Practice and Procedure, § 5433 at 857 (1980) (footnotes omitted) (emphasis added). Later, after discussing several answers to the question of which law applies, including the rote answer provided by the district court here, the text advocates a case-by-case approach:

> Perhaps the best rule would be to have no rule and to resolve questions of conflicting privileges on an ad hoc basis. In each case in which the issue arises, courts should try to balance the state and federal interest in the context of the particular law suit. Relevant factors include the nature of the privilege being asserted, the identity of the person claiming the privilege, the relative importance of the state and federal issues to the law suit, the existence of alternate forms of proof and the need for the evidence claimed to be privileged, the nature of the conflict between state and federal rules and other similar factors. This ad hoc balancing seems more likely to comport with the underlying policy of Rule 501 than any of the categorical tests.

Id., § 5434 at 863-64 (footnotes omitted).

This case affords the Court an excellent opportunity to approve and apply the balancing analysis. In this and the many other EMTALA lawsuits filed around the country, a balancing of interests weighs strongly in favor of respecting the state law hospital peer review privilege. As noted, the state interest in protecting the confidentiality of peer review matters is great. On the other hand, little if any harm will come to federal policy by honoring the state interest. Indeed, doing so is consistent with federal policy.

First, a plaintiff attempting to establish an EMTALA violation has little need to discover peer review matters, so denial of discovery impairs no federal interest. EMTALA concerns patient treatment – it "places obligations of screening and stabilization upon hospitals and emergency rooms who receive patients suffering from an 'emergency medical condition.' " *Roberts v. Galen of Virginia, Inc.*, 119 S. Ct. 685, 685 (1999). Hospital peer review committees do not treat patients; rather, they evaluate patient treatment after the fact. Thus, an EMTALA violation can occur only in a patient's treatment (or lack of treatment), not later in the peer review process. Moreover, discovery of peer review matters will reveal the details of a review based on evidence, such as medical records, that is readily available to plaintiffs. The plaintiffs, or experts they retain, can conduct their own evaluation of the evidence they gather. As Justice Souter wrote for the New Hampshire Supreme Court, a statutory protection of peer review documents "simply leaves certain potential malpractice plaintiffs in the position of any litigant, or intending litigant, who cannot depend on the luxury of relying on the opposing party to furnish pretrial investigation and preliminary expert evaluation." *In re "K"*, 561 A.2d at 1072.

Second, application of a state law privilege is consistent with Congressional intent in enacting EMTALA. State law was not meant to be a stranger to EMTALA actions. To the contrary, Congress deferred to state law in important respects. Congress provided generally that EMTALA's provisions "do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with [an EMTALA requirement]."

42 U.S.C. § 1395dd(f); *see Draper v. Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993) (construing the "preemptive effect [of 1395dd(f)] as narrowly as possible"; "The key phrase is 'directly conflicts' "; applying Oregon notice of a claim requirement); *see also Hardy v. New York City Health & Hospitals Corp.*, 164 F.3d 789 (2d Cir. 1999) (applying New York notice-of-claim law); *Power v. Arlington Hosp. Ass'n*, 42 F.3d 851, 863-64 (4th Cir. 1994) (applying state limitation on amount of damages recoverable in medical malpractice actions). Here, section 1157 is not in direct conflict with any EMTALA provision. Further, in Rule 501 terms, state law *does* "suppl[y] the rule of decision" for "an element of a[n] [EMTALA] claim." That element is damages – EMTALA expressly directs that *state law* governs what damages plaintiffs may recover (42 U.S.C. § 1395dd(d)(2)(A)).

Finally, federal law itself expressly recognizes the importance of confidentiality in hospital peer review proceedings. For example, Congress has made Defense Department medical quality assurance records "confidential and privileged" (10 U.S.C. § 1102(a)) for much the same reasons that state legislatures enacted hospital peer review privileges. *See In re United States*, 864 F.2d 1153, 1154 (5th Cir. 1989). Also, regarding EMTALA specifically, before the federal government will impose sanctions for an EMTALA violation, a peer review organization will conduct an investigation and prepare a report (42 U.S.C. § 1395dd(d)(3)) and that organization's materials are expressly protected from subpoena or discovery in civil proceedings (42 U.S.C. § 1320c-9(d)).

2. This Court should resolve the conflict whether federal law can recognize state privileges as a matter of comity, and if so, this Court should decide the first impression issue whether comity requires application of state hospital peer review privileges in EMTALA lawsuits.

Even if federal privilege law does apply in cases like this one, important unresolved issues still remain. A number of federal courts have used a balancing analysis similar to the one discussed above in deciding whether federal law should recognize a state hospital peer review privilege as a matter of comity. The validity of this analysis is in dispute, however, and the analysis has never been applied in an EMTALA case.

The courts are in conflict over whether it is appropriate at all to use principles of comity to determine federal privilege law. The district court here believed it is (although ultimately concluding the balance of interests required that the state privilege not be recognized) and there is solid precedent for that approach. Courts looking to comity principles have expressed concern about unnecessarily "subject[ing] the citizens of [a] jurisdiction to a double standard of confidentiality and privacy depending on [whether a state or federal] court hears a particular case." *United States v. Illinois*, 148 F.R.D. 587, 590 (N.D. Ill. 1993). As explained in a leading Court of Appeals opinion:

> A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal

> substantive and procedural policy. And where a state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule.

Memorial Hosp. for McHenry County v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981) (citations and internal quotation marks omitted); *see also, e.g., Weekoty v. United States*, 30 F.Supp.2d 1343, 1347 (D. N.M. 1998); *Mercado v. Division of New York State Police*, 989 F.Supp. 521, 522 (S.D. N.Y. 1998); *Holland v. Muscatine Gen. Hosp.*, 971 F.Supp. 385, 389 (S.D. Iowa 1997).

But other courts have rejected comity as a factor in federal privilege law. These courts, too, are concerned about inconsistent privilege laws. It is not inconsistencies between state and federal privilege law within a jurisdiction that troubles these courts, however, but the potential for inconsistencies in federal privilege law across the country. In *Johnson v. Nyack Hosp.*, 169 F.R.D. 550, 558 (S.D. N.Y. 1996), for example, the court stressed the need for an "informed determination of a single, uniform federal law of evidentiary privileges." The court spoke against using principles of comity, calling it a rule under which "parties similarly situated in all respects save the location of the federal court in which they happen to be litigating would be faced with a real possibility of different outcomes based purely on that geographical happenstance." *Id.* at 559; *see also Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F.Supp.2d 1164, 1170 (C.D. Cal. 1998) (interpreting this Court's opinion in *Jaffee v. Redmond* as overruling those cases that look to the law of the forum state as a matter of comity).

Should federal courts avoid those inconsistencies in privilege law that exist "depending on [whether a state or federal] court hears a particular case" (*United States v. Illinois*, 148 F.R.D. at 590) or those that exist depending on "the location of the federal court in which [parties] happen to be litigating" (*Johnson v. Nyack Hosp.*, 169 F.R.D. at 559)? It is an important question affecting federal privilege law generally and this case presents an excellent opportunity to answer it.

If a comity analysis retains vitality, a question of first impression arises – whether that analysis requires recognition of a state hospital peer review privilege in an EMTALA lawsuit. Under comity principles, federal courts have barred discovery of hospital peer review materials in some types of cases and allowed it in others, but no published decision addresses the discoverability of those materials in EMTALA actions.

State hospital peer review privilege statutes are normally disregarded in federal question cases where barring discovery would threaten enforcement of federal law, as in antitrust or civil rights cases where the peer review process *itself* has been used for anticompetitive or discriminatory purposes. Otherwise, however, federal courts usually *do* apply the state discovery privilege to protect the crucial state interest in promoting effective hospital peer review. The distinction was well summarized in *Wei v. Bodner*, 127 F.R.D. 91, 101 (D. N.J. 1989):

> In malpractice actions . . . , the issue is not what transpired during the evaluative process. Rather, it is whether there was negligence. In

> contrast, in an antitrust action where a physician is suing a hospital and others for anticompetitive actions, the claim arises directly from that process. In the former type of situation, *where the evaluative process is the source of information to support a claim independent of the review process, the privilege should prevail and disclosure should not be ordered.* Where . . . the party seeking discovery seeks redress from the evaluative process itself, the privilege must fall in favor of greater interests.

(emphasis added) (citations omitted); *see Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d at 1062-63.

This reasoning supports a protection from discovery in EMTALA cases. As discussed in the preceding section, EMTALA cases are ones where "the evaluative process is the source of information to support a claim *independent of the review process*" and thus where the state law privilege "should prevail and disclosure should not be ordered" (*Wei*, 127 F.R.D. at 101 (emphasis added)). In EMTALA cases, as in malpractice actions, the issue is the treatment of a patient – not the use of the peer review process against a physician for anticompetitive or discriminatory purposes. The peer review process is not on trial; rather, it is merely a potential source of secondary evidence available from other sources.

3. This Court should resolve the conflict whether a federal privilege for hospital peer review exists and, if it does exist, this Court should decide the first impression issue whether that privilege applies in an EMTALA action.

If a state hospital peer review privilege does not apply, either directly or as a matter of comity, a privilege can be found under "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" (Fed. R. Evid. 501). Whether such a privilege exists at all is an issue dividing the lower courts nationwide. If the privilege exists, whether it applies in an EMTALA case is a question of first impression.

Some courts have flatly stated, "[F]ederal law now recognizes a privilege protecting hospital peer review records from disclosure during discovery." *Whitman v. United States*, 108 F.R.D. 5, 7 (D. N.H. 1985); *see Weekoty v. United States*, 30 F.Supp.2d 1343; *Freeman v. Fairman*, 917 F.Supp. 586, 588-89 (N.D. Ill. 1996); *Brem v. DeCarlo, Lyon, Hearn & Pazourek, P.A.*, 162 F.R.D. 94, 101-02 (D. Md. 1995); *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D. D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973). As one court recently concluded, recognition of such a privilege is compelled by "the 'overwhelming public interest' in providing physicians with a confidential context in which to evaluate the effectiveness of life-saving techniques and procedures. . . . " *Weekoty*, 30 F.Supp.2d at 1347-48.

Other courts have come to the opposite conclusion. For example, one court stated, "Medical peer reviews do not enjoy the historical or statutory support upon which

other privileges have been recognized in federal law, and the Hospitals have failed to provide any reason to believe some physicians would not provide candid appraisals of their peers absent the asserted privilege." *Syposs v. United States*, 179 F.R.D. 406, 411-12 (W.D. N.Y. 1998); *see Johnson v. Nyack Hosp.*, 169 F.R.D. at 559-61; *Robertson v. Neuromedical Ctr.*, 169 F.R.D. 80, 83-84 (M.D. La. 1996).

The conflict concerning the existence *vel non* of a federal hospital peer review privilege is a subset of a broader unsettled issue – the status of a self-critical analysis privilege in federal law. In *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992), a Court of Appeals noted that "[t]he Supreme Court and the circuit courts have neither definitively denied the existence of such a privilege, nor accepted it and defined its scope." *Id.* at 425 n.1; *see also Holland v. Muscatine Gen. Hosp.*, 971 F.Supp. at 390 ("The self-critical analysis privilege has had an ambiguous existence, neither uniformly adopted nor rejected"). Guidance from this Court is needed regarding both the self-critical analysis privilege generally and the hospital peer review privilege specifically.

Perhaps the most telling sign that this Court's pronouncements to date are inadequate to determine the privilege issue presented by this case is that the lower courts are interpreting the Court's two most recent privilege opinions (*Jaffee v. Redmond*, 116 S. Ct. 1923, and *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182 (1990)) variously as supporting and opposing the recognition of a hospital peer review privilege. The inconsistent application of the same precedents calls for this Court's attention.

All 50 states and the District of Columbia recognize a hospital peer review privilege. *See* n.2, *ante*. When this Court recognized a federal psychotherapist privilege in *Jaffee*, it was influenced by the States having enacted such a privilege by statute, stating that "the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." *Jaffee*, 116 S. Ct. at 1929-30. The Court explained:

> Because state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that "reason and experience" support recognition of the privilege. In addition, given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.

Id. at 1930 (footnote omitted).

The same considerations militate in favor of a privilege here. There is the same "consensus among the States" in favor of a privilege, and the important public policy underlying California's protection for peer review committees would be frustrated if the persons participating in those committees knew that a plaintiff's pleading of an EMTALA claim in federal court would negate the protection. This reasoning has been found compelling in

some cases (*see Weekoty*, 30 F.Supp.2d at 1346-47), but not in others (*see Johnson*, 169 F.R.D. at 559 n.14 ("detailed consideration of the experience of the fifty states unnecessary" because of reasoning of *University of Pennsylvania* opinion).

Courts finding no federal hospital peer review privilege often rely on *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182, which held there is no federal privilege for academic peer review. *See Johnson*, 169 F.R.D. at 559. Other courts, however, reach the opposite result, finding a difference between hospital and academic peer review. *See Weekoty*, 30 F.Supp.2d at 1345 ("Because of [their] unique role in preserving the public health, medical morbidity and mortality reviews must be distinguished from other peer review cases"); *see also United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 103 (5th Cir. 1992) ("Unlike the privilege claim for faculty tenure decisions rejected in *University of Pennsylvania v. EEOC* . . . the medical peer review process 'is a *sine qua non* of adequate hospital care' ").

Regardless of the validity of the district court's ruling here, the issues presented in this case are undeniably important ones. The issues concern public health care policy of the States and privilege law in federal actions. Until this Court addresses the issues, the lower courts will continue as they have been, on divergent paths, unable to state consistent rules on which federal litigants in general and the medical community in particular can rely with certainty.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re: REDBUD COMMUNITY HOSPITAL DISTRICT,	No. 98-70610 D.C. No. CV-96-04345-SI
REDBUD COMMUNITY HOSPITAL, ADVENTIST HEALTH, INC., Petitioner [sic], v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent, and DAVID BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows, Real Party [sic] in Interest.	(Filed NOV. 16, 1998)
WOLFGANG SCHUG, M.D., Petitioner, v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent,	No. 98-70616 D.C. No. CV-96-04345-SI

and

DAVID BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Real Party [sic] in Interest.

DAVID BURROWS, Successor-In-Interest; CODY BURROWS, Deceased; RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Plaintiffs-Appellees,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT; M. FRED BREWER; ADVENTIST HEALTH INC.; JJ&R EMERGENCY MANAGEMENT GROUP INC.; EMERGENCY MEDICAL MANAGEMENT SERVICES, INC.,

Defendants,

and

WOLFGANG SCHUG, M.D.,

Defendant-Appellant.

No. 98-16089

D.C. No. CV-96-04345-SI

ORDER*

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*This disposition is not appropriate for publication and may not be cited to or by the courts in this circuit except as provided by Ninth Circuit Rule 36-3.

Appeals from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted October 7, 1998
San Francisco, California

Before: HUG, Chief Judge, FLETCHER, and TROTT, Circuit Judges.

Dr. Schug's appeal is dismissed for lack of jurisdiction. *See In re National Mortgage Equity Corp. Mortgage Pool Certificates Litigation*, 857 F.2d 1238, 1240 (9th Cir. 1988). The consolidated petitions for writs of mandamus are denied. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID BURROWS, et al.,

Plaintiffs,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT, et al.,

Defendants.

_____/

No. C 96-4345 SI

ORDER REGARDING APPLICABILITY OF CALIFORNIA EVIDENCE CODE § 1157

(Filed Jan. 13, 1998)

In their objections to a number of plaintiffs' discovery requests, defendants Redbud and Adventist raised claims of privilege under California Evidence Code § 1157, which substantially limits discovery into the proceedings and records of hospital medical staffs concerned with evaluation and improvement of the quality of care in a hospital. During an earlier discovery conference, plaintiffs sought to compel responses to the challenged discovery requests, contending that the limitations imposed on California courts by § 1157 do not apply in federal court.

Plaintiffs' then-pending discovery disputes were partially resolved by this Court's order filed November 3, 1997. However, at that time Superior Court Judge Warren had under submission the question of whether Evidence Code § 1157 applied in the state criminal case pending against Dr. Schug: prosecutors were seeking, and defendant Schug was resisting, production of such records. In

the interest of protecting Dr. Schug's right to a fair criminal trial, this Court refrained from ruling on the applicability of § 1157 in the federal context until the state court had issued its ruling on the matter.

On January 2, 1998, Judge Warren issued a ruling, holding § 1157 was inapplicable in the criminal context presented there, thereby allowing prosecutors to subpoena hospital records claimed to be privileged under § 1157. *In re Search Warrant No. 13489*, San Francisco Superior Court, 1/2/98. Given Judge Warren's ruling, this Court is no longer constrained by the impact its ruling on this issue might have on Dr. Schug's state criminal case.

For the following reasons, the Court concludes that § 1157 is not applicable in this action.

DISCUSSION

Section 1157 provides that proceedings and records of hospital medical staffs concerned with evaluation and improvement of the quality of care in the hospital shall not be subject to discovery. California Evidence Code § 1157 (West 1997). The section further states that no person who attends a meeting of these committees shall be required to testify as to what transpired at that meeting. *Id.*

The existence of privileges in cases in federal court is governed by Rule 501 of the Federal Rules of Evidence, which provides:

> [T]he privilege of a witness, person, government, State, or political subdivision thereof shall

> be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof, shall be determined in accordance with State law.

Defendants assert that § 1157 applies in this action because of [sic] the Emergency Medical Treatment and Active Labor Act of 1986 ("EMTALA"), 42 U.S.C. § 1395dd, incorporates state damages law to the extent that plaintiffs are allowed to "obtain those damages available for personal injury under the law of the state in which the hospital is located." 42 U.S.C. § 1395dd(d)(2)(A). Defendants argue that state law therefore provides the rule of decision, and thus state privilege law governs. Plaintiffs counter that § 1157 is inapplicable in a federal question case such as the instant action, and that when federal and state claims are joined in the same action, claims of privilege are determined under federal law. *See William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982).

This issue appears to be one of first impression. Plaintiffs are correct that ordinarily federal privilege law applies in federal question cases. However, EMTALA is unlike many federal laws in that it incorporates state law, thus requiring a different analysis of the issue than that put forth by plaintiffs.

Other courts have faced a question similar to that presented here when applying state privileges to federal

actions under the Federal Tort Claims Act. The Federal Torts Claim Act requires federal courts to look to the law of the state where the act or omission occurred in order to determine government liability. 28 U.S.C. § 1346(b). Thus, the Federal Tort Claims Act, like EMTALA, incorporates state tort law to some extent. In *Menses v. United States Postal Services*, 942 F.Supp. 1320 (D. Nev. 1996), the court held that the incorporation of state law did not mean that "state law supplies the rule of decision" for purposes of FRE 501. *Accord Young v. United States*, 149 F.R.D. 199 (S.D. Cal. 1993). In reviewing the legislative history of FRE 501, the *Menses* court stated, "Congress recognized that when federal courts merely adopt state law as federal law, there is no need to apply state law in matters such as the admissibility of evidence and claims of privilege, and that federal privilege law controls. It is only where state law is operative of its own force that state law supplies the rule of decision, and, under Rule 501, state privilege law governs." *Id.* at 1322. A state law is self-operative if state law provides the source of the right sued upon. In these cases, "no federal interest justifies overriding a state substantive law such as evidentiary privileges, and to do so would promote forum shopping and lead to an inequitable administration of the laws between state and federal courts." *Id.* In contrast, if the right sued upon has a federal source, then state law is incorporated or adopted as federal law, and federal interests in applying federal evidence rules and privileges outweigh any countervailing state interests.

The Court concludes that FRE 501 does not require the application of § 1157 to the instant action. In an EMTALA action, state substantive law is not operative of

its own force. Rather, EMTALA establishes federal requirements for medical screening, stabilizing treatment, and restriction of transfers until the patient is stabilized. 42 U.S.C. § 1395dd(a)-(c). The statute creates a private right of action under *federal law* against offending hospitals, and incorporates state law only in the determination of damages.

Although federal courts are not required to apply state privileges law to federal questions cases, federal courts may do so in the interest of comity. "[A]s a matter of comity, federal courts should attempt to ascertain what interests inspire relevant state doctrine and should take into account the views of state authorities about the importance of those interests." *Kelly v. City of San Jose,* 114 F.R.D. 653, 656 (N.D. Cal. 1987). In determining whether to apply a state privilege, a federal court should first analyze whether application of the state law would be inconsistent with federal law. *See Pagano v. Oroville Hospital,* 145 F.R.D. 683, 688 (N.D. Cal. 1993). If the state law is not inconsistent, the federal court should attempt to apply the state privilege in harmony with federal privileges law.

In *Pagano v. Oroville Hospital,* the court declined to apply § 1157 to a federal antitrust action, finding there is no clearly recognized federal peer review privilege and that § 1157 is too absolute in its application and effect, and therefore too inconsistent with federal law, to be applicable. *Id.* at 690. The court reasoned that disclosure in that case was necessary because the evidence sought was relevant to the plaintiff's allegations that the hospital had conspired to eliminate the plaintiff as a competitor in providing medical services.

The Court finds the *Pagano* court's reasoning instructive, and declines to apply § 1157 to the instant case. Section 1157 acts as an absolute shield against discovery, and this Court agrees with the *Pagano* court that such absolute protection against discovery is inconsistent with the flexibility of federal privilege law. Plaintiffs have alleged that defendants conspired to falsify Cody Burrows' medical records, and that the evidence they are seeking – to which defendants have raised claims of privilege under § 1157 – is relevant to their spoliation of evidence claim. As a general matter, the Court finds that such evidence may be relevant to this claim, and holds that § 1157 is inapplicable in this action. Defendants may, of course, raise other claims of privilege to these documents if applicable.

IT IS SO ORDERED.

Dated: January 9, 1998

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID BURROWS and RHODA THOMAS,

Plaintiffs,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT; ADVENTIST HEALTH INC.; JJ. & R. EMERGENCY MANAGEMENT GROUP, INC.; WOLFGANG SCHUG, M.D.; M. FRED BREWER, M.D. and DOES I through XXX.

Defendants.

_____/

No. C 96-4345 SI

(Filed MAY 5, 1998)

ORDER:

1. **DENYING PLAINTIFFS' MOTION TO STRIKE EX PARTE COMMUNICATIONS;**
2. **DENYING PLAINTIFFS' MOTION FOR SANCTIONS;**
3. **DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR RECONSIDERATION; and**
4. **RESOLVING PENDING DISCOVERY DISPUTES**

INTRODUCTION

Cody Burrows, an eleven-month old infant, died after being transferred from Redbud Community Hospital to Santa Rosa Community Hospital. David Burrows and

Rhoda Thomas, Cody's parents, filed this lawsuit in federal court alleging violations of the federal Emergency Medical Treatment and Active Labor Act ("EMTALA"), as well as pendant state law claims for medical malpractice, wrongful death, emotional distress, and spoliation of evidence.

Defendants have requested reconsideration of this Court's "Order Regarding Applicability of California Evidence Code § 1157" filed January 13, 1998, in which the Court held that the state peer review privilege did not apply in the instant case. At issue were plaintiffs' discovery requests for documents produced during hospital peer review sessions after Cody Burrows' death. In the January 13 order, the Court first concluded that under EMTALA, federal law supplies the rule of decision, and therefore according to Federal Rule of Evidence 501, federal privilege law applies. Federal law does not recognize a peer review privilege. However, in the interest of comity the Court contemplated whether the state privilege should apply. The Court, relying on *Pagano v. Oroville Hospital*, 145 F.R.D. 683 (E.D. Cal. 1993), found that comity did not warrant the application of state privilege law.

Mindful of the then-pending criminal proceedings against defendant Schug, the Court waited to issue its order until Judge Warren rendered a decision regarding the applicability of Evidence Code § 1157 in the criminal context. On January 2, 1998, Judge Warren issued a ruling holding that § 1157 was inapplicable in the criminal proceedings against defendant Schug. This Court, no longer constrained by the impact its ruling on this issue might have on Dr. Schug's state criminal case, issued its order on January 13, 1998. Immediately after this Court issued

its order, defendants notified the Court by letter that the California Court of Appeals had stayed Judge Warren's ruling as the result of a Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief. Defendants also requested that this Court reconsider its opinion. On January 20, 1998, this Court granted defendants' request for reconsideration and set a briefing schedule on the matter. In the meantime, the Writ to the California Court of Appeals was denied on January 29, 1998. The defendants then petitioned the California Supreme Court for a stay and review. That petition was denied on February 4, 1998.

In addition to defendants' motion for reconsideration, the Court has before it plaintiffs' motion to strike defendants' allegedly *ex parte* communications with the Court, as well as plaintiffs' corresponding motion for sanctions. Plaintiffs argue that defendants' letters notifying the Court of the stay on Judge Warren's ruling and requesting reconsideration of this Court's order constituted impermissible *ex parte* communications.

DISCUSSION

A. Plaintiffs' Motions to Strike *Ex Parte* Communications and for Sanctions

Plaintiffs argue that defendants engaged in improper *ex parte* communications with the Court in violation of Civil Local Rule 11-3(c). Plaintiffs object that they were not provided prior notice of defendants' communications to the Court as required by the Local Rules, and that therefore these letters should be stricken. Plaintiffs argue that defendants' letters invoke the power of the Court

and seek judicial relief, thereby affecting plaintiffs' substantive rights. In addition, plaintiffs specifically object to the letter sent by Robert Lynch, counsel for defendant Schug, on the ground that although the letter indicates that plaintiffs were copied, plaintiffs in fact never received a copy of the letter. Plaintiffs request sanctions against Mr. Lynch.

Defendants respond that they have not engaged in *ex parte* communications with the Court because plaintiffs were copied on all correspondence. Defendants state that they sent letters to the Court because they viewed the matter as a discovery dispute, and had been previously informed to notify the Court of such disputes by letter brief. With regard to the letter sent by defendant Schug, Mr. Lynch states that the failure to copy plaintiffs was due to inadvertent clerical error, but that plaintiffs were not prejudiced since defendant Schug sought the same relief – reconsideration – as sought by the other defendants.

As the Court has already decided to reconsider its January 13, 1998 order. [sic] In the Court's view, these letters were not impermissible *ex parte* communications, as plaintiffs' counsel was copied on all letters save one. As to defendant Schug's letter to the court which plaintiffs never received, the Court is persuaded that the error was inadvertent and that counsel for defendant Schug did not act in bad faith. Accordingly, the Court DENIES plaintiffs' motions to strike and for sanctions.

B. Defendants' Motion [sic] for Reconsideration

Defendants advance numerous arguments in favor of their motions for reconsideration. To the extent that defendants reargue the same points, the Court will not reconsider these arguments. However, the Court will reconsider the new arguments raised by the parties.

Defendants first argue that plaintiffs' request for the peer review records only applies to the state law claim of spoliation, and thus state privilege law should apply to this claim. However, defendants' arguments fail for two reasons. First, plaintiffs contend that the records are relevant because the defendants, and other unknown persons who may be members of the Peer Review Committee, conspired to alter, destroy and falsify Cody's medical records with regard to the care and treatment he received during his stay at Redbud. This contention is common to all causes of action, including the federal cause of action under EMTALA. As such, federal privilege law governs.

Second, assuming arguendo that the evidence was relevant only to the spoliation claim, Federal Rules of Evidence dictate that privileges asserted in federal question cases shall be governed by federal law. State privilege law applies to purely state law claims brought in federal court pursuant to diversity jurisdiction. However, state law claims that are pendent to federal question cases are governed by federal privilege law. *See Wm. T. Thompson Co. v. General Nutrition Corp., Inc.*, 671 F.2d 100, 104 (3d Cir. 1982); *Pagano v. Oroville Hospital*, 145 F.R.D. 683 (E.D. Cal. 1993); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 458-459 (N.D. Cal. 1978). In the instant case the Court's jurisdiction is grounded on 28 U.S.C. § 1331

based on plaintiffs' EMTALA claims. Thus, federal privilege law applies.

Defendants next argue that even if federal privilege law applies, FRE 501 provides that in the absence of a controlling statute, courts look to common law principles to determine the applicability of evidentiary principles. *See Teasdale v. Marin General Hospital*, 138 F.R.D. 691, 694 (N.D. Cal. 1991). Federal courts in the Ninth Circuit have not yet adopted California's peer review privilege. Therefore, as provided by FRE 501, the question of whether § 1157 applies in federal court is "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FRE 501. Reason and experience dictate that the courts, in the interest of comity, look to state privilege law to ascertain the interests at stake.

Courts have held that there is no federal common law or statutory privilege protecting peer review medical records when the plaintiff's claim arises out of the disciplinary proceedings themselves. *See Pagano v. Oroville Hospital*, 145 F.R.D. 683, 691 (E.D. Cal. 1993) (holding that federal common law does not recognize medical peer review privilege in antitrust cases where the peer review itself is under attack). Courts have, however, recognized a peer review privilege in medical malpractice cases. *See Bredice v. Doctors Hospital*, 50 F.R.D. 249 (D. D.C. 1970), *aff'd* 479 F.2d 920 (D.C. Cir. 1973). Courts have drawn a distinction between medical malpractice and antitrust cases by reasoning that in medical malpractice cases the issue is whether the defendant was negligent in his care of the patient, not what transpired at a subsequent date during a peer review proceeding. *See Bredice*, 50 F.R.D.

249. In addition, disclosure of information contained in the peer review meetings would have little impact on a plaintiff's ability to prove his case. *See id.* On the other hand, in antitrust cases the claims arise out of the disciplinary proceedings themselves, and thus discovery is permitted since there would be no other source of the information. *See Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1062 (7th Cir. 1981).

Defendants argue that an EMTALA claim is essentially a medical malpractice claim, and thus the reasoning of the medical malpractice cases should apply. However, EMTALA claims are not grounded in tort concepts. *See Griffith v. Mt. Carmel Medical Center*, 842 F. Supp. 1359 (D. Kan 1994). A plaintiff's claim in an EMTALA action does not rest on any proof that defendant was negligent, but rather is predicated on the hospital's violation of the EMTALA statute making the hospital strictly liable. Therefore, the Court is not persuaded that an EMTALA claim is analogous to a medical malpractice claim and thus does not apply the reasoning of those cases. In addition, the Court is persuaded that to the extent plaintiffs allege that Dr. Schug may have been instructed to create the addendum and burn his notes at the peer review meeting, plaintiffs' claim for spoliation of evidence and EMTALA depend on communications made during the peer review proceedings. Thus, this case is more like the antitrust cases than medical malpractice cases, since part of the claims arise out of the peer review meetings. Therefore, barring any overriding policy concerns, the state privilege does not apply in federal court.

Defendants argue that overriding policy concerns dictate that the state privilege should apply. First, they

argue that because state law requires medical practitioners to participate in the peer review sessions, it is unfair to then allow discovery of these meetings. Cal.Bus. & Prof. Code § 2282; Cal. Health & Saf. Code § 32128. Furthermore, defendants argue that § 1157 was instituted to encourage doctors to speak freely at such meetings in an effort to improve the quality of care. Therefore, defendants argue that the California legislature, in enacting § 1157, made a statutory promise to physicians that their self-critical commentary in peer review sessions would not be publicly disclosed. However, the action has been brought in federal court, and federal law, rather than state law, applies. Furthermore, recognizing a privilege under § 1157 would be inconsistent with the federal policy against privileges and in favor of broad disclosure.

Defendants also raise several constitutional issues. First, defendant Schug argues that emergency room doctors are more likely to be implicated in EMTALA actions than other doctors because EMTALA prevents the transfer of medically unstable patients, a situation more frequently encountered in the emergency room. Therefore, defendant Schug argues that disclosing peer review records creates a constitutionally-suspect distinction between emergency room physicians and other doctors in California. Defendant reasons that if peer records are discoverable in EMTALA actions, emergency room doctors cannot rely on confidentiality, whereas non-emergency room doctors can rely on this protection.

The Court is not persuaded by such reasoning. The status of being an emergency room doctor is not a protected characteristic warranting strict scrutiny analysis; therefore, any classification resulting from this Court's

order must meet the rational basis test. As long as there is some rational basis for the classification, the equal protection clause is not implicated. Here, the federal policies favoring disclosure and discovery in order to ascertain truth in the litigation context provide a rational basis for the classification, and therefore defendant's equal protection rights have not been violated.

Defendant Schug also argues that disclosure of the peer review records will deprive him of due process of the law. He contends that the right to pursue an occupation is a fundamental right, therefore, the government cannot impair his right to practice his profession without due process. *See Ender v. Schutzbank*, 68 Cal.2d 162, 169 (1968). However, defendant Schug's reasoning is flawed because he is being accorded due process since he is receiving a full hearing in which he can present his defense. *See id. at 172*. Therefore, defendant fails to convince the Court that disclosure will violate his due process rights.

Finally, defendant Schug argues that disclosure will violate his right to privacy in the peer review records. California recognizes a constitutional right to privacy which is consistent with federal law and therefore can be considered in deciding whether or not to disclose the peer review records. *See Pagano*, 145 F.R.D. at 695. The Court considers the following factors in determining the scope of protection to be accorded in the privacy context:

> (1) [T]he probable encroachment of the individual's privacy right if the contested action is allowed to proceed, and the magnitude of the encroachment; (2) whether the encroachment of the privacy right would impact an area that has

> traditionally been off limits from most regulation; (3) whether the desired information is available from other sources with less encroachment of the privacy right; (4) the extent to which the exercise of the individual's privacy rights impinge on the rights of others; and (5) whether the interests of society at large encourage a need for the proposed encroachment.

Pagano, 145 F.R.D. at 698-99.

In *Pagano*, the Court reasoned that fourth and fifth factors [sic], which both bear on the policies favoring discovery, outweighed the first two factors which bear on the degree of encroachment. This is because discovery and admissibility of relevant truthful information affect the individual rights of litigants as well as the public interest. As one court has noted, "litigation has the tendency to make public the sort of information that individuals would otherwise prefer to keep private. Public disclosure, in the end, is not only natural and generally unavoidable but also necessary and healthy to a process so dependent on truth and accuracy." *Cook v. Yellow Freight System, Inc.*, 132 F.R.D. 548, 551 (E.D. Cal. 1990) (as cited in *Pagano*, 145 F.R.D. at 699). In addition, the names of patients and physicians were kept confidential in order to minimize the degree of encroachment upon the privacy rights of individuals. Finally, because the information sought was not available from other sources, the third factor also weighed in favor of disclosure.

In applying the five factors above, the Court finds the reasoning in *Pagano* persuasive. Here, the only relevant

information is that directly related to the care of Cody. Furthermore, in Dr. Shug's criminal trial, the peer review records have already been discovered. Therefore, the balance of the five factors enumerated above, as well as the overall federal policy favoring broad disclosure, convince this Court that disclosure does not impermissibly violate Dr. Schug's right to privacy, especially since the information has already been revealed in the criminal context.

In conclusion, the Court finds that the hospital peer review records are discoverable, subject to a protective order. The parties are directed to submit a stipulated protective order providing for disclosure but ensuring the privacy of the physicians other than Dr. Shug. The Court, may at a later time and for good cause shown, entertain a motion for disclosing the identity of the physicians insofar as it is relevant to the plaintiffs' case. The information disclosed pursuant to this order shall be designated as "Confidential Material," and shall be used solely in connection with this litigation, or related appellate procedures, and not for any other purpose.

C. Pending discovery disputes

During a case management conference on February 23, 1998, counsel for plaintiffs informed the Court that he believed there were numerous unresolved discovery disputes pending before the Court. Plaintiffs have since submitted a letter identifying these pending disputes, which plaintiffs contend are still pending from plaintiffs' Motion to Compel submitted October 22, 1997. It is this Court's understanding, as well as defendants', that this

Court's November 3, 1997 order resolved all the discovery disputes as raised in plaintiffs' motion, except those dependent upon the Court's ruling on the applicability of § 1157. In the interest of clarity, the Court will reiterate what is already contained in the November 3, 1997 order: (1) defendants Redbud and Adventist have not waived their privileges because a privilege log had been produced; (2) plaintiffs are limited to 25 interrogatories per defendant; (3) defendant Adventist is ordered to produce documents #2, 6, 8, and 9; (4) defendant Redbud is ordered to produce documents #14 and 17. Furthermore, because the Court is now ruling that § 1157 is not applicable in federal court, to the extent that defendants objected to any discovery disputes on the basis of the applicability of § 1157, they are now ordered to respond.

Defendant Adventist correctly notes that if the Court rules that § 1157 is not applicable, Adventist will be required to answer plaintiffs' First Set of Interrogatories to defendant Adventist Health. However, Adventist is only required to answer numbers 1, 2a, 2b, 2c, 3e, 3f, 3g, 3h, 3i, 3j, 4 5a, 5b, 5c, 5d, 5e, because this comports with the 25 interrogatory limits imposed in the Court's November 3, 1997 Order. In addition, Adventist concedes that it will have to produce Mr. Shultz for further deposition if § 1157 is not applicable. However, because Mr. Shultz has been previously deposed, this deposition should be limited to subject matter thought to be protected by § 1157 which is no longer protected.

Defendant Schug requests further opportunity to brief the issues regarding his deposition, interrogatories and document production because he contends that previous briefing focused primarily on his fifth amendment

rights. The Court declines to grant this request because the parties have been given ample time to raise all objections. As such, any discovery which was withheld on the basis of § 1157 is now ordered to be produced, including interrogatories, depositions, and documents.

With respect to the deposition of Ms. DeLashmutt, the Court construes plaintiffs' request as a motion to complete her deposition. The Court has read the portions of the deposition submitted by plaintiffs and will allow plaintiffs to complete the deposition because it agrees that defendants' counsel impermissibly coached Ms. DeLashmutt. All parties should be advised that objections should not be used to attempt to coach a witness. *See Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993). All objections to form of the question should be succinct and clearly state the objection. Further objections based on privilege should merely state the privilege asserted.

CONCLUSION

For the foregoing reasons, plaintiffs' motions to strike *ex parte* communications and for sanctions is DENIED and defendants' motion for reconsideration is DENIED in that § 1157 does not apply in federal court, but is GRANTED with respect to protective order of materials discovered.

IT IS ORDERED.

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

Dated: May 5, 1998

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: REDBUD COMMUNITY HOSPITAL DISTRICT	No. 98-70610
	DC# CV-96-4345-SYI Northern California
REDBUD COMMUNITY HOSPITAL, ADVENTIST HEALTH, INC.,	
Petitioners,	(Filed Jun. 8, 1998)
vs.	
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	
DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; et al.,	
Real Parties in Interest.	
WOLFGANG SCHUG, M.D.,	No. 98-70616
Petitioner,	
vs.	
UNITED STATED DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	
DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; et al.,	ORDER
Real Parties in Interest.	

Before: REINHARDT, THOMPSON, and LEAVY, Circuit Judges

The court on its own motion consolidates case nos. 98-70610 and 98-70616.

These petitions for writs of mandamus raise issues that warrant a response. *See* Fed. R. App. P. 21 (b). Accordingly, within 14 days of this order, the real parties in interest shall file a response.

The district court may file a response if it so desires. Petitioners may file a reply within 7 days of service of the response(s). The petitions, response(s) and any reply shall be referred to the next available motions panel.

Petitioners' request for a stay of the May 5, 1998 order pending resolution of their petitions is granted.

The Clerk shall serve a copy of this order on the district court.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: REDBUD COMMUNITY HOSPITAL DISTRICT	No. 98-70610
	DC# CV-96-4345-SYI Northern California
REDBUD COMMUNITY HOSPITAL, ADVENTIST HEALTH, INC.,	
Petitioners,	
vs.	(Filed Jun. 29, 1998)
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	
DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; et al.,	
Real Parties in Interest.	
WOLFGANG SCHUG, M.D.,	No. 98-70616
Petitioner,	
vs.	
UNITED STATED DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	ORDER
DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; et al.,	
Real Parties in Interest.	

Before: REINHARDT, THOMPSON, and LEAVY, Circuit Judges

The motion of the California Medical Association and the California Healthcare Association for leave to file a letter brief in support of petitioners' request for a writ of mandamus is granted.

These madamus petitions are referred to a merits panel for disposition. Petitioners' request for leave to file a reply brief on or before July 17, 1998 is granted. Because the principal briefs have been filed, these matters are now ready to be calendared.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: REDBUD COMMUNITY HOSPITAL DISTRICT	No. 98-70610
	D.C. No. CV-96-04345-SI
REDBUD COMMUNITY HOSPITAL, ADVENTIST HEALTH, INC.,	(Filed Dec. 31, 1998)
Petitioner [sic],	
v.	
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	
and	
DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,	
Real Party [sic] in Interest.	
WOLFGANG SCHUG, M.D.,	No. 98-70616
Petitioner,	D.C. No. CV-96-04345-SI
v.	
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	

and

DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Real Party [sic] in Interest.

DAVID BURROWS, Successor-In-Interest; CODY BURROWS, Deceased; RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Plaintiffs-Appellees,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT; M. FRED BREWER; ADVENTIST HEALTH INC.; JJ&R EMERGENCY MANAGEMENT GROUP INC.; EMERGENCY MEDICAL MANAGEMENT SERVICES, INC.,

Defendants,

and

WOLFGANG SCHUG, M.D.,

Defendant-Appellant.

No. 98-16089

D.C. No. CV-96-04345-SI

ORDER

Before: HUG, Chief Judge, FLETCHER, and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Hug and Trott have voted

to reject the suggestion for rehearing en banc, and Judge Fletcher so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: REDBUD COMMUNITY HOSPITAL DISTRICT	No. 98-70610
	D.C. No. CV-96-04345-SI
REDBUD COMMUNITY HOSPITAL, ADVENTIST HEALTH, INC.,	
Petitioner [sic],	(Filed Jan. 21, 1999)
v.	
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	
and	
DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,	
Real Party [sic] in Interest.	
WOLFGANG SCHUG, M.D.,	No. 98-70616
Petitioner,	D.C. No. CV-96-04345-SI
v.	
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	

and

DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Real Party [sic] in Interest.

DAVID BURROWS, Successor-In-Interest; CODY BURROWS, Deceased; RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Plaintiffs-Appellees,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT; M. FRED BREWER; ADVENTIST HEALTH INC.; JJ&R EMERGENCY MANAGEMENT GROUP INC.; EMERGENCY MEDICAL MANAGEMENT SERVICES, INC.,

Defendants,

and

WOLFGANG SCHUG, M.D.,

Defendant-Appellant.

No. 98-16089

D.C. No. CV-96-04345-SI

ORDER

TROTT, Circuit Judge:

Petitioner's [sic] motion for a stay of the mandate is GRANTED for 60 days from the date of this order so that

it [sic] may file a petition for a writ of certiorari. Fed. R. App. P. 41(d)(2)(A-B).

Federal Rules of Evidence

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

* * *

California Evidence Code

§ 1157. Proceedings and records of organized committees having responsibility of evaluation and improvement of quality of care; exceptions

(a) Neither the proceedings nor the records of organized committees of medical, medical-dental, podiatric, registered dietitian, psychological, or veterinary staffs in hospitals, or of a peer review body, as defined in Section 805 of the Business and Professions Code, having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or for that peer review body, or medical or dental review or dental hygienist review or chiropractic review or podiatric review or

registered dietitian review or veterinary review or acupuncturist review committees of local medical, dental, dental hygienist, podiatric, dietetic, veterinary, acupuncture, or chiropractic societies, or psychological review committees of state or local psychological associations or societies having the responsibility of evaluation and improvement of the quality of care, shall be subject to discovery.

(b) Except as hereinafter provided, no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting.

(c) The prohibition relating to discovery or testimony does not apply to the statements made by any person in attendance at a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.

(d) The prohibitions in this section do not apply to medical, dental, dental hygienist, podiatric, diatetic, psychological, veterinary, acupuncture, or chiropractic society committees that exceed 10 percent of the membership of the society, nor to any of those committees if any person serves upon the committee when his or her own conduct or practice is being reviewed.

(e) The amendments made to this section by Chapter 1081 of the Statutes of 1983, or at the 1985 portion of the 1985-86 Regular Session of the Legislature, or at the

1990 portion of the 1989-90 Regular Session of the Legislature, do not exclude the discovery or use of relevant evidence in a criminal action.

* * *

United States Code, Title 42

§ 1395dd. Examination and treatment for emergency medical conditions and women in labor

(a) Medical screening requirement

In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subschapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

(b) Necessary stabilizing treatment for emergency medical conditions and labor

(1) In general

If any individual (whether or not eligible for benefits under this subchapter, comes to a hospital and the hospital determines that the individual has a emergency medical condition, the hospital must provide either –

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

(2) Refusal to consent to treatment

A hospital is deemed to meet the requirement of paragraph (1)(A) with respect to an individual if the hospital offers the individual the further medical examination and treatment described in that paragraph and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such examination and treatment, but the individual (or a person acting on the individual behalf) refuses to consent to the examination and treatment. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such examination and treatment.

(3) Refusal to consent to transfer

A hospital is deemed to meet the requirement of paragraph (1) with respect to an individual if the hospital offers to transfer the individual to another medical facility in accordance with subsection (c) of this section and informs the individual (or person acting on the individual's behalf) of the risks and benefits to the individual on such transfer, but the individual (or a person acting on the individual's behalf, refuses to consent to the transfer. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such transfer.

(c) Restricting transfers until individual stabilized

(1) Rule

If an individual at a hospital has an emergency medical condition which has not been stabilized (within the meaning of subsection (e)(3)(B) of this section), the hospital may not transfer the individual unless –

(A)(i) the individual (or a legally responsible person acting on the individual's behalf) after being informed of the hospital's obligations under this section and of the risk of transfer, in writing requests transfer to another medical facility,

(ii) a physician (within the meaning of section 1395x(r)(1) of this title) has signed a certification that based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to the unborn child from effecting the transfer, or

(iii) if a physician is not physically present in the emergency department at the time an individual is transferred, a qualified medical person (as defined by the Secretary in regulations) has signed a certification described in clause (ii) after a physician (as defined in section 1395x(r)(1) of this title), in consultation with the person, has made the determination described in such clause, and subsequently countersigns the certification; and

(B) the transfer is an appropriate transfer (within the meaning of paragraph (2)) to that facility.

A certification described in clause (ii) or (iii) of subparagraph (A) shall include a summary of the

risks and benefits upon which the certification is based.

(2) Appropriate transfer

An appropriate transfer to a medical facility is a transfer –

(A) in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child;

(B) in which the receiving facility –

(i) has available space and qualified personnel for the treatment of the individual, and

(ii) has agreed to accept transfer of the individual and to provide appropriate medical treatment;

(C) in which the transferring hospital sends to the receiving facility all medical records (or copies thereof), related to the emergency condition for which the individual has presented, available at the time of the transfer, including records related to the individual's emergency medical condition, observations of signs or symptoms, preliminary diagnosis, treatment provided, results of any tests and the informed written consent or certification (or copy thereof) provided under paragraph (1)(A), and the name and address of any on-call physician (described in subsection (d)(1)(C) of this section) who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment;

(D) in which the transfer is effected through qualified personnel and transportation equipment, is required including the use of necessary and medically appropriate life support measures during the transfer; and

(E) which meets such other requirements as the Secretary may find necessary in the interest of the health and safety of individuals transferred.

(d) Enforcement

(1) Civil money penalties

(A) A participating hospital that negligently violates a requirement of this section is subject to a civil money penalty of not more than $50,000 (or not more than $25,000 in the case of a hospital with less than 100 beds) for each such violation. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under this subparagraph in the same manner as such provisions apply with respect to a penalty or proceeding under section 1320a-7a(a) of this title.

(B) Subject to subparagraph (C), any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, and who negligently violates a requirement of this section, including a physician who –

(i) signs a certification under subsection (c)(1)(A) of this section that the medical benefits reasonably to be expected from a transfer to another facility outweigh the risks associated with the transfer, if the physicians knew or should have known that the benefits did not outweigh the risks, or

(ii) misrepresents an individual's condition or other information, including a hospital's obligations under this section,

is subject to a civil money penalty of not more than $50,000 for each such violation and, if the violation is gross and flagrant or is repeated, to exclusion from participation in this subchapter and State health care programs. The provisions of section 1320a-7a of this title (other than the first and second sentences of subsection (a) and subsection (b)) shall apply to a civil money penalty and exclusion under this subparagraph in the same manner as such provisions apply with respect to a penalty, exclusion, or proceeding under section 1320a-7a(a) of this title.

(C) If, after an initial examination, a physician determines that the individual requires the services of a physician listed by the hospital on its list of on-call physicians (required to be maintained under section 1395cc(a)(1)(I) of this title) and notifies the on-call physician and the on-call physician fails or refuses to appear within a reasonable period of time, and the physician orders the transfer of the individual because the physician determines that without the services of the on-call physician the benefits of transfer outweigh the risks of transfer, the physician authorizing the transfer shall not be subject to a penalty under subparagraph (B). However, the previous sentence shall not apply to the hospital or to the on-call physician who failed or refused to appear.

(2) Civil enforcement

(A) Personal harm

Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may,

in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(B) Financial loss to other medical facility

Any medical facility that suffers a financial loss as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for financial loss, under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(C) Limitations on actions

No action may be brought under this paragraph more than two years after the date of the violation with respect to which the action is brought.

(3) Consultation with peer review organizations

In considering allegations of violations of the requirements of this section in imposing sanctions under paragraph (1), the Secretary shall request the appropriate utilization and quality control peer review organization (with a contract under part B of subchapter XI of this chapter) to assess whether the individual involved had an emergency medical condition which had not been stabilized, and provide a report on its findings. Except in the case in which a delay would jeopardize the health or safety of individuals, the Secretary shall request such a review before effecting sanction under paragraph (1) and shall provide a period of at least 60 days for such review.

(e) Definitions

In this section:

(1) The term "emergency medical condition" means –

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in –

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part; or

(B) with respect to a pregnant women [sic] who is having contractions –

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

(2) The term "participating hospital" means hospital that has entered into a provider agreement under section 1395cc of this title.

(3)(A) The term "to stabilize" means, with respect to an emergency medical condition described in paragraph (1)(A), to provide such medical treatment of the condition as may be necessary to assure,

within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), to deliver (including the placenta).

(B) The term "stabilized" means, with respect to an emergency medical condition described in paragraph (1)(A), that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), that the woman has delivered (including the placenta).

(4) The terms "transfer" means the movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who (A) has been declared dead, or (B) leaves the facility without the permission of any such person.

(5) The term "hospital" includes a critical access hospital (as defined in section 1395x(mm)(1) of this title).

(f) Preemption

The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.

(g) Nondiscrimination

A participating hospital that has specialized capabilities or facilities (such as burn units, shock-trauma units, neonatal intensive care units, or (with respect to rural areas) regional referral centers as identified by the Secretary in regulation) shall not refuse to accept an appropriate transfer of an individual who requires such specialized capabilities or facilities if the hospital has the capacity to treat the individual.

(h) No delay in examination or treatment.

A participating hospital may not delay provision of an appropriate medical screening examination required under subsection (a) of this section or further medical examination and treatment required under subsection (b) of this section in order to inquire about the individual's method of payment or insurance status.

(i) Whistleblower protections

A participating hospital may not penalize or take adverse action against a qualified medical person described in subsection (c)(1)(A)(iii) or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.

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